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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]
LIN 03 086 51462

Office: NEBRASKA SERVICE CENTER

Date:

DEC 06 2004

IN RE:

Petitioner:
Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Outstanding Professor or Researcher pursuant to
Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a university. It seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B), as an outstanding professor or researcher. The petitioner seeks to employ the beneficiary as a "Research Scientist" in the Department of Physics. The director determined the petitioner had not established that it extended an offer of permanent employment to the beneficiary.

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority Workers. -- Visas shall first be made available ... to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(B) Outstanding Professors and Researchers. -- An alien is described in this subparagraph if-

- (i) the alien is recognized internationally as outstanding in a specific academic area,
- (ii) the alien has at least 3 years of experience in teaching or research in the academic area, and
- (iii) the alien seeks to enter the United States --

(I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,

(II) for a comparable position with a university or institution of higher education to conduct research in the area, or

(III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

The regulation at 8 C.F.R. § 204.5(i)(3) states that a petition for an outstanding professor or researcher must be accompanied by:

(iii) An offer of employment from a prospective United States employer. A labor certification is not required for this classification. The offer of employment shall be in the form of a letter from:

(A) A United States university or institution of higher learning offering the alien a tenured or tenure-track teaching position in the alien's academic field;

(B) A United States university or institution of higher learning offering the alien a permanent research position in the alien's academic field; or

(C) A department, division, or institute of a private employer offering the alien a permanent research position in the alien's academic field. The department, division, or institute must demonstrate that it employs at least three persons full-time in research positions, and that it has achieved documented accomplishments in an academic field.

As used in this section, the term "permanent," in reference to a research position, means either tenured, tenure-track, or for a term of indefinite or unlimited duration, and in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination. 8 C.F.R. § 204.5(i)(2).

This petition was filed on January 21, 2003. A letter accompanying the petition, dated January 13, 2003, from Dr. [REDACTED] Associate Professor, Department of Physics, University of Idaho, to the "Immigration and Naturalization Service," states: "From February, 2002 to the present, [the beneficiary] has been a Research Associate in the Department of Physics at the University of Idaho, Moscow."

On appeal, counsel states: "It is our contention that a job offer letter has been provided to [Citizenship and Immigration Services (CIS)]. The original petition filed January 21, 2003 contained a 14 page letter on University of Idaho letterhead, signed by [REDACTED] Ph.D."

On page 14 of his letter, [REDACTED] states:

As Associate Professor in the Department of Physics of the University of Idaho, I hereby confirm that the duration of this position will be in conformity with the requirements of 8 C.F.R. § 204.5(i)(2), in that it will be for a term of indefinite or potentially unlimited duration, and in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination, and of course conditioned upon your kind approval. This letter may be considered a permanent offer of full-time employment at the sum of \$29,000 per year to [the beneficiary] upon the terms contained herein.

The evidence accompanying the petition included no formal job offer letter, i.e., a letter from the petitioner addressed to the beneficiary that sets forth a binding offer of employment. The regulation at 8 C.F.R. § 204.5(i)(3)(iii)(B), however, specifically requires that "[t]he offer of employment **shall be in the form of a letter from . . . [a] United States university or institution of higher learning offering the alien a permanent research position in the alien's academic field.**" [emphasis added] Dr. McIlroy's letter indicates that the beneficiary is employed by the University of Idaho, but it is not an offer of permanent employment addressed to the beneficiary. Rather, it is a letter to the "Immigration and Naturalization Service" which, over the course of 14 pages, discusses the beneficiary's qualifications and his eligibility under the regulatory criteria at 8 C.F.R. § 204.5(i). This letter discusses (among other things) the petitioner's intention to continue employing the beneficiary, but the letter does not constitute a formal offer of employment; indeed, it indicates that the beneficiary has already accepted an offer made earlier (i.e., the beneficiary's "Research Associate" position that commenced in February 2002). The record does not contain any documentation, pre-dating the petition's filing date, that initiated an employer-employee relationship

between the petitioner and the beneficiary or otherwise extended a permanent job offer from the petitioner to the beneficiary. Nor is there any evidence showing that the University of Idaho has a personnel system in place that grants an Associate Professor sole authority to extend a permanent job offer to a university employee. For example, the petitioner has not provided a copy of its official administrative hiring procedures related to permanent university research positions.

On September 30, 2003, the director requested specific documentation pertaining to the absence of a job offer letter from the petitioner to the beneficiary. The director's request for evidence stated: "Please submit a complete copy of the actual offer of employment made by the University of Idaho to [the beneficiary]."

In response, the petitioner submitted a letter from Dr. [REDACTED] Acting Chair and Professor of Physics, Department of Physics, University of Idaho, dated October 8, 2003 and addressed to "Citizenship and Immigration Services" rather than the beneficiary. Dr. [REDACTED] letter states:

To whom it may concern:

This is to verify that we have offered a permanent research position to [the beneficiary] in our Department of Physics, University of Idaho. [The beneficiary] has been working for the department as a research scientist since February 2002.

Dr. [REDACTED] October 8, 2003 letter is a verification letter addressed to CIS rather than the original "complete copy of the actual offer of employment made by the University of Idaho to [the beneficiary]" (as requested by the director). The petitioner failed to submit evidence related to the original permanent job offer.

The regulation at 8 C.F.R. § 103.2(b)(12) states, in pertinent part: "*Effect where evidence submitted in response to a request does not establish eligibility at the time of filing.* An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." The letter submitted in response to the director's request for evidence fails to demonstrate that a permanent job offer from the University of Idaho to the beneficiary existed as of this petition's filing date (January 21, 2003).

The director denied the petition, stating:

The petition as initially filed contained a January 12, 2003, letter by Dr. [REDACTED] Associate Professor, that provides relevant information about the petitioner and the beneficiary's qualifications. The initial evidence did not, however, include a copy of a letter by the University of Idaho offering the beneficiary a permanent research position.

In correspondence dated September 30, 2003, the petitioner was requested to submit a complete copy of the actual offer of employment made by the University of Idaho to the beneficiary. The petitioner's response was received on October 16, 2003, and has been incorporated into the record for consideration.

In responding, the petitioner has not furnished the requested evidence.

* * *

The record indicates the beneficiary has been employed by the petitioner since February, 2002. No representation was made on filing that the terms of the beneficiary's past employment have not been committed to writing, nor that the terms of any future employment will not be committed to writing.

[CIS] initially found and on re-examination reaffirms that Dr. [REDACTED] letter does not constitute an offer by the University to the alien of a permanent research position. The letter is not, for example, addressed to the prospective employee. The letter does not advise the prospective employee of basic terms of employment.

* * *

[CIS] recognizes that individual institutions vary in their particular hiring practices but, for the purposes of this classification, the regulation requires that an offer of a permanent research position be submitted as initial evidence. Title 8, Code of Federal Regulations, Part 103.2(b), states: "An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form."

In responding, the petitioner submits an additional letter, by Dr. [REDACTED], Acting Chair and Professor of Physics, University of Idaho. This suggests that a Professor, the Department or the University has had communication with the beneficiary regarding employment.

In evaluating whether a given offer of employment is permanent within the meaning of the regulation, [CIS] is willing to consider all evidence having a bearing on the issue, but must necessarily examine the specific terms contained in the offer of employment made by the employing institution. It is precisely that document that was requested. Title 8, Code of Federal Regulations, Part 103.2(b)(14) states, in pertinent part:

Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition.

The missing documentary evidence is material to eligibility for the benefit sought. The petition is denied pursuant to Title 8, Code of Federal Regulations, Part 103.2.

On appeal, the petitioner submits a letter, dated February 3, 2004, from [REDACTED] Payroll Manager, Payroll Services, University of Idaho, stating: "This letter is to verify the employment of [the beneficiary] . . . at the University of Idaho. [The beneficiary] has been employed at the University of Idaho since June 23, 2002 as a Research Associate Scientist in the Department of Physics. His current annual salary is \$32,988.80."

The letter from Jan Lewis does not state that the beneficiary holds a permanent research position, nor is it a binding offer of employment. Once again, the petitioner has submitted an employment verification letter

(addressed "To Whom It May Concern") rather than an original job offer letter from the petitioner to the beneficiary that sets forth a binding offer of permanent employment, including specific terms thereof. It is further noted that the February 3, 2004 letter from [REDACTED] indicates that the beneficiary "has been employed since June 23, 2002 as a Research Associate Scientist in the Department of Physics" while the January 13, 2003 letter from Dr. [REDACTED] and the October 8, 2003 letter from Dr. [REDACTED] indicate that the beneficiary has been working in the Department of Physics as a Research Associate/research scientist since February 2002. The petitioner has not resolved this discrepancy. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Regardless of the beneficiary's actual start date or the specific terms contained in the permanent job offer letter, it is the absence of first-hand evidence of the original, binding permanent job offer between the petitioner and the beneficiary that is the primary ground on which the director's decision rests. The petitioner's failure to present contemporaneous evidence of the original job offer from the university to the beneficiary for a permanent research position as a "Research Scientist" is a crucial omission from the record. If such a permanent job offer did indeed exist as of the petition's filing date, it is not clear as to why the petitioner, which was afforded ample opportunity to provide such evidence, has failed to do so even now at the appellate stage. In this case, the record contains no evidence of a job offer between the petitioner and the beneficiary that existed at the time of filing and which sets forth a binding offer of permanent employment. See *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971). A petitioner must establish eligibility at the time of filing.

Pursuant to the regulations, the petitioner's failure to provide contemporaneous evidence of the original permanent job offer creates a presumption of ineligibility. The regulation at 8 C.F.R. § 103.2(b)(2)(i) states, in pertinent part:

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue.

In this case, the petitioner has not presented the original permanent job offer letter (pre-dating the petition), nor has it provided contemporaneous secondary evidence from the University of Idaho's personnel office, for example, demonstrating that such a "permanent" job offer existed between both parties as of January 21, 2003.

For the above stated reasons, we find petitioner has not established that it extended an offer of permanent employment to the beneficiary as of the filing date of the petition. The record does not contain any qualifying documentation, pre-dating the petition's filing date, that initiated an employer-employee relationship between the petitioner and the beneficiary or otherwise extended a permanent job offer from the petitioner to the beneficiary. Therefore, the petitioner has not established eligibility pursuant to 8 C.F.R. § 204.5(i)(3)(iii).


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The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.